PLP's Response to EPA's 15 Day Notice Letter Regarding the Agency's Proposed 404(c) Veto of the Pebble Mine

Briefing to the U.S. Environmental Protection Agency

May 12, 2014

EPA's Action Unauthorized by Congress

Congress Authorized EPA to Veto or Restrict Only Specific Permit Proposals

- EPA may (1) "prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site" or (2) "deny or restrict the use of any defined area for specification (including the withdrawal of the specification."

- EPA may take such action *only after determining* "that the discharge of such materials into such area will have an unacceptable adverse effect . . ."

EPA's Action Unauthorized by Congress

EPA is Seeking to Expand its Statutory Authority Impermissibly

- EPA's effort to invoke a preemptive veto is an attempt to expand its statutory authority to include land use planning, including of state, tribal and private lands.
- In a briefing to EPA Administrator Lisa Jackson, EPA staff wrote "[a] proactive 404(c) will provide the regulated community clarity on what can and cannot be permitted allowing for more efficient and timely development of permitted projects."
- They further wrote that the preemptive veto "[c]an serve as a model of proactive watershed planning for sustainability."
- Congress did not authorize broad watershed planning through 404; EPA can veto a specific disposal site *only if* it can demonstrate unacceptable adverse effects to aquatic resources.
- EPA materials admit this has never been done before in the history of the CWA.

EPA Should Wait for the Corps' CWA and NEPA Review Prior to Invoking Section 404(c)

EPA Should Not Act Before a Permit Application has Been Submitted and Reviewed

- Once the permit application is submitted and deemed complete, the Corps must review and determine the least environmentally damaging practicable alternative.
- This is at the heart of Section 404 permitting; noncompliance with the LEDPA requirement is a sufficient basis for the Corps to deny the permit.
- EPA scientists admit that the permitting and NEPA processes are considerably more detailed and comprehensive than the contents of the Bristol Bay Assessment.
- Section 401 water quality certification also helps ensure environmental protection.

EPA Should Wait for the Corps' CWA and NEPA Review Prior to Invoking Section 404(c)

EPA Should Not Take Any Action Until an EIS Has Been Prepared

- EIS will provide information on potential impacts to water quality, wetlands, and other aquatic resources.
- EIS will evaluate mitigation measures, social and economic impacts, and alternatives.
- Consultation with F&WS and NMFS.
- EPA can voice concerns about the specific project.
- EIS facilitates public participation.
- EPA admits that the Assessment does not attempt to measure such considerations
- In the past, EPA has only exercised its 404 authority as a last resort, after it has reviewed a proposed Corps permit decision, provided comments/objections, and given the Corps and applicant an opportunity to address EPA's concerns through amended project design or mitigation. The same should happen here.

The Assessment Does Not Provide a Legitimate Basis for 404(c) Action

The Assessment's Mine Scenarios Are Unrealistic Because They Lack Modern Engineering Design and Environmental Management Practices

- EPA claims its three mine scenarios are based on an NDM economic assessment.
- NDM's preliminary economic assessment does not present a detailed engineering analysis of any proposed development.
- No detail on the plans, strategies, and technologies for managing environmental effects.
- PEA is out of date – does not reflect the current status of engineering and project planning at Pebble. EPA knows and admits this.
- Many of the engineering and environmental management assumptions EPA applies to its mine scenarios do not reflect "international best practice."

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The Assessment's Mine Scenarios Are Unrealistic Because They Lack Modern Engineering Design and Environmental Management Practices

- The Assessment's Projected Impacts on Downstream Water Flows Are Greatly Exaggerated
  - Flow reductions modeled in the Assessment use assumptions about surplus water releases that underestimate by more than 80 percent the surplus water volumes available for release.
  - EPA assumes release of 50% of all surplus water to North Fork Koktuli and 50% to South Fork Koktuli and none to Upper Tularik.
  - This is a wholly arbitrary assumption and one that would not be permitted.
  - Even with EPA assumptions, all but one of the flow changes estimated by EPA is 10% or less; such flow changes would provide "a relatively high level of ecosystem protection."
  - Had EPA selected a more science-based strategy, all flow changes would be less than 10%, providing "a relatively high level of ecosystem protection."
  - Allocating one-third of surplus to each stream would achieve this level of protection.
  - Five times more surplus water will be available for release than the Assessment predicts.
  - Using a PHABSIM model for release strategy shows habitat increases in nearly every instance.

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The Assessment's Mine Scenarios Are Unrealistic Because They Lack Modern Engineering Design and Environmental Management Practices

- The Assessment's Projected Impacts on Downstream Water Quality Are Greatly Exaggerated
  - EPA assumes a significant volume of leachate will not be captured by water management systems, causing significant downstream water quality effects.
  - Uncontrolled seepage from both waste rock storage and tailings storage facilities assumed in the Assessment is greater than would be permitted by regulatory authorities.
  - It is also greater than what would be expected at a modern mine using conventional seepage design considerations and water management practices.
  - EPA assumes that 50% of all leachate produced from water flowing through waste rock placed outside the open pit would escape to the environment; and that 100% of seepage at the downstream edge of TSF embankments would escape, meaning *no seepage collection measures at all*.
  - Such a scenario does not reflect modern mine engineering design or international best practice, and could not be permitted in the U.S.

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- The Assessment Overstates Other Risks Associated with Mine Facilities and Operations
  - EPA uses an ICOLD report from 2001, that looked at historical TSF embankment risk, dating back as far as 1917, to predict the likelihood of operating failures at a modern mine.
  - Predictive model is fundamentally flawed particularly because the practice of modern engineering is focused on learning from past errors.
  - Mines permitted decades ago without modern permitting requirements and technological developments in engineering design and construction have had a much higher failure rate than modern mines. **In fact, no tailings embankment built since 2000 using a center-line or downstream construction method and located in a jurisdiction with modern environmental standards and regulatory oversight has ever failed.**
  - One peer reviewer stated "It is expected that [the likelihood of a TSF embankment failure] will be much lower than those used in the evaluations of the scenario in the EPA Assessment."

The Assessment Does Not Provide a Legitimate Basis for 404(c) Action

The Development Footprints Associated with the Assessment's Speculative Mine Scenarios Greatly Overstate the Footprint Impacts

- Direct effects associated with the Assessment's mine scenarios are entirely speculative, as there is no mine plan yet.
- EPA's speculation does not provide a sufficient record on which to base a major regulatory decision.
- EPA's footprint estimates are inconsequential in the context of the broader region – between 0.009% and 0.08% of the Bristol Bay watershed.
- Estimated wetlands impacts are between 0.0007% and 0.003% of Alaska's wetlands and .004% and 0.015% of Bristol Bay's wetlands.
- USGS data shows that EPA inflated the stream lengths directly affected by each mine scenario by as much as 35%.

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The Assessment Does Not Account for Compensatory Mitigation Measures

- The Assessment does not provide any compensatory mitigation for EPA's unavoidable impacts to aquatic resources, stating that because "[t]he Bristol Bay Assessment is not a regulatory action . . . a complete evaluation of compensatory mitigation is outside the scope of the assessment."
- Compensatory mitigation is a critical component of CWA permit decisions, and is a factor that much be considered in any 404(c) decision.
- BBA Appendix J acknowledges that a wide array of potential mitigation measures was recommended by peer reviewers and the public, but EPA concludes that, "these three watersheds are largely unaltered by human activities and there appear to be no sites that a mitigation project could restore or enhance . . . ."
- Both a UNFAO and BPA studies show successful mitigation in addition of in-stream structures and the reconnection of side channels or off-stream habitats.
- PLP has identified many places to reconnect off channel habitat in the vicinity of the project.
- EPA's Assessment has not meaningfully addressed compensatory mitigation, and acknowledges that it is the Corps' responsibility to determine what mitigation is preferable. EPA should, therefore, await the submission of a mining plan and its evaluation by the Corps.

The Assessment Does Not Provide a Legitimate Basis for 404(c) Action

The Assessment Does Not Demonstrate that the Pebble Project Presents Unacceptable Adverse Effects on Fisheries

- The Assessment does not quantify the impact of the mine scenarios on any regional fishery, or on regional wildlife or Alaska Native cultures (its three denominated endpoints).
- While the Assessment predicts certain impacts of mineral development on aquatic habitat, it provides no causal linkage between these impacts and the Pebble Project. For this reason, EPA has not demonstrated that the Pebble Project will cause unacceptable adverse impacts on fisheries.
- EPA failed to consider voluminous information including Pebble's EBD (27,000 pages and $150 million); ADFG information on fish distribution, abundance and density; and many other sources.
- EPA admits repeatedly that the Assessment does not evaluate key information necessary before making a regulatory decision.

The Assessment Does Not Provide a Legitimate Basis for 404(c) Action

EPA's Procedures Before and During the Publication of the Assessment Demonstrate the Document's Bias

- The Outcome of the Assessment was Predetermined to Support a Section 404(c) Veto
- The Flawed Peer Review Processes Undermine the Assessment's Credibility
  - EPA selectively peer reviewed and incorporated biased, anti-mining reports.
  - The peer review procedures themselves stifled opportunities for criticism.
- Before the assessment process even began, personnel in EPA's Region 10 were requesting funds to initiate a veto. "While resorting to exercising EPA's 404(c) authority is rare (only 12 actions since 1981), the Bristol Bay case represents a clear and important need to do so given the nature and extent of the adverse impacts . . . ."

A Section 404(c) Veto Would Violate the Alaska Statehood Act and ANILCA

The Alaska Statehood Act and Subsequent Corresponding Federal Legislation Preclude EPA from Vetoing the pebble Project

- The Alaska Statehood Act provides that the State is granted and entitled to public lands of the US in Alaska. Alaska received over 103 million acres for the express purpose of developing natural resources to generate income for the State. The Pebble prospect is located on such land that the federal government granted to Alaska under the Statehood Act.
- Courts have held than when Congress grants lands to a state, congressional intent is clear that the state must have a right of access to that land. Congress' intent is clear that Alaska and its lessee should be allowed to develop the land and resources that the federal government granted to Alaska.
- Allowing EPA to veto mineral development on State land would run afoul of the principle repeatedly recognized by the Supreme Court that a state's property rights are "essential attributes of sovereignty".
- Although development on state lands is subject to federal regulation, there is no statutory justification for federal agency enactment of "proactive watershed planning."

A Section 404(c) Veto Would Violate the Alaska Statehood Act and ANILCA

A Section 404(c) Veto Violates the Policy and Spirit of ANILCA

- ANILCA was enacted to resolve any remaining disputes regarding the federal government's interest in Alaskan land conservation after the Alaska Statehood Act. It thus codifies the policy of balancing federal conservation and state revenue interests.
- ANILCA's "no-more" clause limits the federal government's ability to withdraw additional public lands from development by requiring Congress' specific approval of any withdrawal.
- EPA's veto threatens to remove tracts of land for conservation, without Congress' specific approval.

The Harms of a Preemptive Veto Greatly Outweigh EPA's Stated Benefit

- The Mere Threat of Initiating the Section 404(c) Process has Harmed the Pebble Project and the Local Economy
  - See discussion of harm to Northern Dynasty Minerals.
  - Investor departures have caused significant job losses in the region, where Pebble was the major employer.
- The Pebble Project Would Have Substantial Benefits for Local and State Economies
  - Pebble mine would support some 4,700 jobs in Alaska during construction and 2,900 during production.
  - The mine will contribute $400 million per year to the State's GDP during construction and up to $1.4 billion during production.
- The Preemptive Initiation of a 404(c) Veto will Deter Investment in other Major Projects.
- There is No Benefit to Initiating the Section 404(c) Veto Process Now.